RECORD AND BRIEFS

No. 16-980

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IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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The Pew Center on the States, Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade (2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/PewUpgradingVoterRegistrationpdf.pdf [http://goo.gl/EZZ9J4] ... 12-13

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STATEMENT OF INTEREST[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

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[1] Because this case is before the Court for oral argument, the ten-day notice requirement for filing of an *amicus curiae* brief does not apply. Both Petitioner and Respondents have consented to the filing of *amicus curiae* briefs in this matter, and the Clerk has noted these blanket consents on the docket of this case. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

Amici represent elected and appointed state and local governments and government officials who are tasked with maintaining voter rolls and running elections. Amici submit this brief to assist the Court in

understanding the practical implications of the case before it. Regarding elections, state and local governments are tasked with encouraging voter participation while also maintaining accurate voter rolls. These dual goals—each significant enough to be addressed by both the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA)—demand flexibility for successful execution in the myriad of locales represented by amici.

While amici offer this brief in support of the Petitioner, their concerns go far beyond the issues raised in the instant appeal. Thus, amici offer this brief in support of the fundamental proposition that, given the varying resources, responsibilities, and challenges of state and local governments, whatever decision this Court makes should recognize the need for clarity of the law in this area and for allowing flexible, individual approaches within the bounds of that law.

INTRODUCTION AND SUMMARY OF ARGUMENT

Registering voters and maintaining voter rolls have historically been actions taken by state and local governments. Thus, state and local governments have been the "laboratories of democracy" when it comes to these often competing goals. Were the only goal of voter registration to have as many registered voters as possible, there would be little incentive to remove registered voters from voter rolls, or to require registration at all. Similarly, were the only goal to maintain accurate voter rolls, voter registration that carries over from one election to another would likely bow to a system of registration for each election coupled with stringent voter identification requirements. State and local governments have worked diligently to strike a

balance that preserves voter rights by ensuring access to the voting process while at the same time preserving the integrity of elections by ensuring the accuracy of voter rolls.

Amici offer this brief to provide a pragmatic context to the decision the Court will make on the issues presented. Regardless of the Court's ultimate decision, amici ask the Court to keep in mind that it is hundreds, if not thousands, of individualized state and local governments who are tasked with implementing the legal requirements for voter registration and maintenance of voter rolls. Because these state and local governments already vary in their approaches, and will always vary in their resources, their constituencies, and their challenges, amici ask the Court to provide two things: 1) clear direction to guide state and local governments in the creation and any necessary revision of future and existing plans addressing voter registration and voter roll maintenance; and 2) flexibility to address these issues when creating and maintaining their programs. The need for such guidance is underscored by the presence of opposing constituencies who tend to bring suits against state and local governments regardless of the plans put forth.

ARGUMENT

I. THIS COURT SHOULD BE MINDFUL OF THE PRAGMATIC ISSUES FACED BY STATE AND LOCAL GOVERNMENTS IN CARRYING OUT THEIR ROLES IN THE ELECTION PROCESS.

A. Federalism and State and Local Governments' Involvement in the Election Process

When drafting the Constitution "[t]he Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011). Thus, the concept of federalism was born. As noted by this court, "[f]ederalism has more than one dynamic." *Id.* "Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.* (quotation omitted).

To achieve these goals, the Constitution provides that all powers not specifically granted to the federal government are reserved to the states or citizens. U.S. Const. amend. X. Moreover, particularly with regards to elections, Article I, § 4 (the Election Clause), gives states primary responsibility for regulating the "Times, Places and Manner of holding Elections." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2265, 186 L. Ed. 2d 239 (2013). Thus, it is the states' duty to regulate the election process, even

those involving federal elections. "By reserving to the States default responsibility for administering federal elections, the Elections Clause protects several critical values . . . ." *Id.* at 2272 (Alito, J., dissenting). First, "it was found necessary to leave the regulation of federal elections, in the first place, to the state governments, as being best acquainted with the situation of the people." *Id.* (internal quotations and citation omitted). Second, "[b]y giving States a role in the administration of federal elections, the Elections Clause reflects the States' interest in the selection of the individuals on whom they must rely to represent their interests in the National Legislature." *Id.* Third, allocating the responsibility of regulating *federal* elections to the states also protects state rights to regulate *state and local* elections. "As a practical matter, it would be very burdensome for a State to maintain separate federal and state registration processes with separate federal and state voter rolls. For that reason, any federal regulation in this area is likely to displace not only state control of federal elections but also state control of state and local elections." *Id.* Thus, the duty of the states to manage elections is a longstanding duty, and the value inherent in delegating this duty to the states is evident.

It is equally evident that with each state managing its own election systems, no single method of election management exists. While this high degree of involvement by each separate state in the election process might lead one to believe that we operate under fifty different electoral systems, the fact that many states grant local governments a significant role in election management means that, in reality, we operate under *hundreds, if not thousands,* of different electoral systems. By way of example only, a few of the differing

systems used by states to operate and maintain their voter registrations and voter rolls follow:

- Kansas calls for the chief state election official or county officer to check the registration records of voters against the National Change of Address files once each calendar year. Kan. Stat. Ann. § 25-2354(a).
- West Virginia, as part of its process for removing ineligible voters from the active registration list, compares the records of all of its voters not identified as registered to vote in another county in the State with National Change of Address files. W. Va. Code § 3-2-25(d). West Virginia also requires its statewide database to be coordinated with other agency databases within the state. § 3-2-4a(a)(4).
- Virginia requires that on or before October 1 of each year, the Department of Elections conduct a match of the Virginia registered voter lists with the list of deceased persons maintained by the Social Security Administration. Va. Code Ann. § 24.2-404.3. Likewise, Virginia keeps a permanent, separate list of those who were removed from voter rolls due to death or a felony conviction and a list of all removed voters, along with the reason for their removal, for four years. § 24.2-404.
- Nevada requires its Department of Motor Vehicles to verify the accuracy of information in a voter registration application with the Social Security Administration. Nev. Rev. Stat. § 293.675.
- Rhode Island requires its Secretary of State to receive a monthly list of names of deceased

people from the state's office of vital statistics. R.I. Gen. Laws § 17-10-1(c).

- Ohio requires state agencies, including the Department of Health, Bureau of Motor Vehicles, Department of Job and Family Services, and the Department of Rehabilitation and Corrections to provide data to its Secretary of State to maintain the statewide voter registration database. Ohio Rev. Code Ann. § 3503.15(A)(2)(a).
- When a registrar in Louisiana receives word that a voter is ineligible or has moved, the voter is first moved to the inactive list while the registrar confirms the voter's status. If a voter is on the inactive list for two general election cycles, his voter record is cancelled. La. Stat. Ann. § 18:193.
- In North Carolina, county boards of election administer the voter registration process. N.C. Gen. Stat. § 163-82.1(b). While North Carolina itself maintains a centralized registration list, each county board also provides list maintenance. *See* N.C. Gen. Stat. § 163-82.11; *see also* Mo. Rev. Stat. §§ 115.141, .158 (placing local election authorities in charge of voter registration and giving state and local election authorities shared responsibility for maintaining statewide voter list).

And this is just as it should be. By operating under different systems and trying different methodologies, state and local governments are, in fact, operating as the "laboratories of democracy." This is a role state and local governments guard jealously both because of the important part it plays in our democracy, and because of the obligations state and local governments have

to the individual voters within their jurisdictions. But the importance of this role for state and local governments is commensurate with its difficulty. In attempting to succeed, state and local governments face a dizzying number of challenges, including increasingly confusing and conflicting opposition to their efforts to comply with the legislation at issue in the instant case.

B. Conflicting Constituencies

As noted in the filings of the parties, two federal statutes, the NVRA and HAVA, are at issue in this matter. Specifically, the two parties dispute whether these statutes allow the use of the Ohio Supplemental Process as a means for maintaining the accuracy of voter rolls.

The NVRA, 52 U.S.C. §§ 20501–20511, is designed to protect the integrity of the electoral process and ensure that states maintain accurate and current voter registration lists for federal elections. It balances the need to ensure fair access to voter registration with the need to maintain accurate voter registration lists for the purpose of promoting election integrity.

The NVRA mandates that states maintain accurate voter rolls, requiring each state to "conduct a general program that makes reasonable effort to remove" from its voter-registration rolls the names of persons who may have moved or passed away. § 20507(a)(4). To promote the goal of increased voter participation, the NVRA also prohibits states from:

(1) removing a person's name "by reason of the person's failure to vote." § 20507(b)(2).

(2) removing a person's name on the ground that the person has moved

(a) unless the person fails to respond to an address-confirmation notice and

(b) fails to vote in the next two consecutive general elections for federal office. § 20507(d)(1)(B) (added to the NVRA by the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, § 903, 116 Stat. 1666, 1728).

Beyond these general outlines, however, the NVRA largely leaves to the states how best to effectuate its purposes.

The NVRA became effective in most states on January 1, 1995, and applies to 44 states and the District of Columbia. The Act provides that states were exempt from the Act if, as of August 1, 1994, they had no voter registration requirements or had election-day registration at polling places. § 20503(b). The six states exempt from the NVRA under this provision are Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. *About the National Voter Registration Act*, U.S. Dep't of Justice, https://www.justice.gov/crt/about-national-voter-registration-act (last updated Aug. 8, 2015).

Although states ultimately retain liability for NVRA compliance, case law establishes that where state law delegates certain NVRA responsibilities to Local Election Agencies (LEAs), local governments also are liable for compliance. *See True the Vote v. Hosemann*, 43 F Supp. 3d 693, 712 (S.D. Miss. 2014) ("Other courts confronted with NVRA lawsuits have likewise recognized that Counties or County officials were proper parties to the suit. . . ."); *see also Project Vote / Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012) (defendant sued in her official capacity as General Registrar of

Norfolk). Thus, both state and local governments have an interest in issues impacting NVRA compliance.

In 2002, Congress passed HAVA, which, in part, required states to establish computerized statewide voter databases, and required that such databases be maintained consistent with the provisions of the NVRA. 52 U.S.C. § 21083. Taken together, it is fair to say that the NVRA and HAVA seek to achieve two primary objectives:

(1) to establish procedures to increase the number of eligible citizens who register to vote in federal elections; and

(2) to protect the integrity of the electoral process by ensuring maintenance of accurate and current voter registration rolls.

While each of these goals is laudable, in their attempts to achieve both, state and local governments can become caught between the proverbial rock and hard place.

Nowhere is this tension more apparent than in the legal actions faced by state and local governments, brought by competing constituencies who often favor one goal over the other, or who have differing opinions on how these statutes should be applied. For example, in the current matter, the State of Ohio faces an action by parties who seek to invalidate a chosen methodology for voter roll maintenance based upon the assertion that the process endangers the rights of certain voters. But state and local governments also consistently face legal actions by parties unsatisfied with current voter registration maintenance, who often seek enforcement through the entry of consent decrees requiring state and local governments to take specific actions to remove ineligible and potentially

ineligible voters from the voter registration rolls. *See, e.g.*, *Am. Civil Rights Union v. McDonald*, No. 2:14-cv-12 (W.D. Tex. 2014); *Am. Civil Rights Union v. Jefferson Davis Cty.*, No. 2:13-cv-87 (S.D. Miss. 2013).

In summary, amici note the undeniable existence of two (or more) distinct and very active constituencies, each seeking to hold state and local governments accountable for compliance with the NVRA and HAVA. Each constituency pushes state and local governments to create and adopt programs to achieve the goals of the NVRA and HAVA (as viewed by that constituency), and each shows no hesitancy in bringing legal action when it perceives that program implementation is at odds with its own, specific goals.

C. Impact on State and local governments

Not surprisingly, when state and local governments are called upon to engage in this delicate balancing act, the consequences are distinctly felt by these entities in terms of expense and utilization of resources. It is common for local governments to cover the costs of running elections or at the very least engage in cost sharing with the state. These duties often including voter list maintenance. *See generally* The Constitution Project & Electionline.org, Election Reform Briefing: Working Together? State and Local Election Coordination (2002), https://research.policyarchive.org/15106.pdf [https://perma.cc/G7BR-5RQB]. While numbers vary between localities, costs for printing and processing forms, handling returned mail from inaccurate records, and maintaining registration databases add millions of dollars to state and local budgets that often are already strained. *See* The Pew Ctr. on the States, Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System

Needs an Upgrade 5 (2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/PewUpgradingVoterRegistrationpdf.pdf [http://goo.gl/EZZ9J4].

In fact, one case study examining 2008 voter data in Oregon established that the average cost of voter registration and voter roll maintenance in that year was $4.11 per registered Oregon voter. *See* The Pew Center on the States, The Real Cost of Voter Registration: An Oregon Case Study 1 (2010), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2013/the-real-cost-of-voter-registration-pdf.pdf. If the cost was divided only among those initially registering and those making some change to their voter registration, the cost per transaction was $7.67. *Id.* At first blush, these costs may seem insignificant. But there are currently in excess of 200,000,000 registered voters in the United States. Using the numbers for Oregon as representative, the annualized national cost of voter registration and voter roll maintenance would be upwards of $800,000,000 based on limited 2008 cost data.

However, these hard dollar costs for registering voters, running elections, and maintaining voter databases are only the beginning. When competing constituencies bring legal actions, state and local governments have the additional costs associated with litigation, including, but not limited to, attorneys' fees for adequate representation. In addition, the internal costs for maintaining the electoral system (such as worked hours, purchasing and maintaining adequate resources to perform necessary functions, etc.), place a strain on already overburdened state and local government budgets. And to the extent state and local governments are forced to constantly rework voter registration and maintenance procedures as a result

of such challenges, each additional iteration adds to that burden.

None of which is to say that state and local governments wish to avoid the vital role they play in our country's electoral system. Nothing could be further from the truth. Management and maintenance of the electoral system *should* be maintained at a level of government that is accessible and answerable to the voters of a particular state. Ultimately, however, the mandates of federal legislation such as the NVRA and HAVA become financial burdens on state and local governments, making clear guidance on compliance issues paramount. The better state and local governments understand the legal requirements under which they operate, the more efficiently they can carry out those duties.

D. Amici's Goal

Against this contextual backdrop of the complexity in which state and local governments operate, the need for substantive guidance in the legal standards to be applied under federal regulations affecting voter registration and voter roll maintenance becomes clear. State and local governments need certainty as to what the law is so they can proceed with carrying out the twin goals of the NVRA and HAVA within the bounds of that law.

As important, given the wide variance of procedures employed by different state and local governments to comply with the law, is this Court's recognition that there is no "one size fits all" answer. State and local governments should understand the clear dictates of the law, but also should be given flexibility within the limits of that law to employ the tactics that work best for particular states or local governments. To be more

specific, it seems apparent that simply relying upon the National Change of Address database, helpful though it is, is not enough. More needs to be done to ensure the integrity of voter rolls. The real question, then, is, "What is that something more?"

Considering the instant case as an example provides some understanding of what amici are seeking on behalf of their members. Petitioner argues that the Ohio Supplemental Process is a valid process by which to maintain voter rolls because it is the voter's failure to return a response card that initiates that voter's ultimate removal from the voter rolls. Respondents argue that because the sending of the response card itself keys off of a voter's failure to vote within a certain time, the voter's history impermissibly instigates the voter's removal from the voter roll. Even if the Court rules against Petitioner in this case, amici ask for guidance from the Court of the following nature:

- Can voter history ever be used in any way to assess the integrity of voter rolls?
- If so, how and to what degree may that history be used?
- If voter history may be used to any degree, what are adequate safeguards to prevent violation of voters' rights?

Amici recognize, acknowledge, and embrace that one process will not be the answer for every state or local government. Different state and local governments have different resources available. Some are more sensitive to allegations of voter fraud than others. But receiving the clearest guidance possible from the Court will allow state and local governments to employ

the needed flexibility while staying within the bounds of the law.

CONCLUSION

If the Court rules against Petitioner, amici are not asking the Court for an advisory opinion. But the reality is that many questions obviously abound regarding the application of the federal mandates captured within the NVRA and HAVA. Amici ask only that the Court provide as much clear guidance as possible within the parameters of the issues presented by this case to allow state and local governments to effectuate the goals of governing legislation, both in their creation and implementation of voter roll maintenance programs, and in their dealing with legal actions by constituencies that may continue to challenge such programs.

Respectfully submitted,

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